S E R V E D
November 21, 2014
FEDERAL MARITIME COMMISSION

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 14-06**

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**SANTA FE DISCOUNT CRUISE PARKING, INC., d/b/a EZ CRUISE PARKING;
LIGHTHOUSE PARKING INC.; and
SYLVIA ROBLEDO d/b/a 81st DOLPHIN PARKING**

**v.**

**THE BOARD OF TRUSTEES OF THE GALVESTON WHARVES; and
THE GALVESTON PORT FACILITIES CORPORATION**

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**ORDER ON PENDING MOTIONS and PARTIAL DISMISSAL**

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## PART I – BACKGROUND

### I. FACTUAL BACKGROUND.

Respondents The Board of Trustees of the Galveston Wharves and The Galveston Port Facilities Corporation (Respondents) own and operate the Texas Cruise Ship Terminal at Piers 25 and 27 (Cruise Terminal) and Terminal parking lots in Galveston, Texas.[1] The Cruise Terminal is a marine terminal and Respondents are marine terminal operators within the meaning of the Shipping Act of 1984 (Shipping Act or Act). Complainants Santa Fe Discount Cruise Parking, Inc. d/b/a EZ Cruise Parking, Lighthouse Parking, Inc., and Sylvia Robledo d/b/a 81st Dolphin Parking (Complainants) are private companies that own and/or operate parking lots outside the Cruise Terminal. Complainants are in the business of providing parking for passengers who embark on cruises from the Cruise Terminal. As part of their service, Complainants provide transportation for passengers between their lots and the Cruise Terminal.

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[1] The facts stated are derived from the Complaint and exhibits attached to the Complaint. Facts alleged in the Complaint are taken as true when considering the motions to dismiss. *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1260 (11th Cir. 2009).

Respondents opened the Cruise Terminal in 2000. Common carriers such as Royal Caribbean Cruise Lines and Celebrity Cruise Lines call on the Cruise Terminal. Each Complainant operates a parking lot located within a few blocks of the Cruise Terminal. They focus their businesses on providing cruise passengers with convenient and secure parking lot storage for their vehicles while they are on cruises. Each Complainant operates shuttle buses to transport customers with their luggage directly to and from the Cruise Terminal, allowing them to stay with their luggage, keep their families together, and avoid traffic at the port facility entrance otherwise associated with unloading baggage from their cars themselves prior to parking.

In August 2006, Respondents promulgated Tariff Circular No. 6 to establish fees charged to operators of private parking lots and other companies that drop off and pick up customers at the Cruise Terminal. To receive a permit, an applicant must pay an application fee, comply with certain liability and other insurance requirements, pay a decal fee, and pay an access fee. The 2006 tariff established a decal fee of $10.00 per decal per year for charter buses, commercial passenger vehicles, limousines, and off-port parking users, and a $7.50 per decal per year for taxicabs with City of Galveston permits. The tariff established a per-trip access fee for charter buses and commercial passenger vehicles, but did not impose an access fee on taxicabs or on limousines with seating capacity of not more than eight persons. (Complaint Exh. A at 3F Note C.)

The tariff defines "Off-Port Parking User":

> [A] commercial business entity which provides or arranges for one or more commercial passenger vehicles, courtesy vehicles, buses or shuttles, however owned or operated, to pick up or drop off passengers within a terminal complex of the Galveston Wharves in connection with the operations of a business of the user involving the parking of motor vehicles of any type at a facility located outside of the boundaries of property owned, operated or controlled by the Galveston Wharves.

(Complaint Exh. A at 3I.) Complainants meet this definition. As off-port parking users, in addition to the decal charge, Complainants were charged an access fee of "$8.00 per parking space located in the Off-Port Parking User's parking facility, with number of billable parking spaces to be confirmed periodically by the Galveston Wharves." (Complaint Exh. A at 3F-3G Note D.) Complainants paid the access fee, apparently without complaint, until they commenced this proceeding. *See Santa Fe Discount Cruise Parking, Inc. v. The Board of Trustees of the Galveston Wharves*, C.A. No. 3:14-cv-00206 (S.D. Tex. Aug. 5, 2014) (Agreed Interim Order).

Respondents amended the tariff on November 21, 2013, (Complaint Exh. C at 3F-3G), but apparently never implemented the amendment.

In the action that precipitated this proceeding, on May 19, 2014, Respondents again amended the tariff and made the amendment effective July 1, 2014. The amended tariff imposed a $60.00 parking fee on charter bus owners and operators; a charge of $25.00 per decal per vehicle annually and $30.00 per access/trip on commercial passenger vehicles, courtesy vehicles, shuttles, or

limousines with seating capacity of fifteen persons or more; and a charge of $15.00 per decal per vehicle annually and $20.00 per access/trip on commercial passenger vehicles, courtesy vehicles, shuttles, or limousines with seating capacity of fewer than fifteen persons. Taxicabs with a City of Galveston permit were charged $7.50 per decal per vehicle annually and no access fee. (Complaint Exh. H at 3F Note C.)

> Those Off-Port Parking Users, as defined herein, in operation and accessing the Texas Cruise Ship Terminal on Galveston Island®, or the Texas Cruise Ship Terminal at Pier 27, collectively the Cruise Ship Terminal Complex, as of August 15, 2006 shall, in lieu of the Access/Trip fee, be subject to a monthly Access Fee equal to the amount of $28.88 per parking space located in the Off-Port Parking User's parking facility, with number of billable parking spaces to be confirmed periodically by the Galveston Wharves. The Access Fee will be effective on and after July 1, 2014.

(Complaint Exh. H at 3F-3G Note D.)

On June 16, 2014, Complainants responded to the May 22, 2014, tariff amendment by filing a Complaint with the Commission alleging that Respondents violated the Shipping Act. Complainants also filed a complaint in the Southern District of Texas seeking declaratory and injunctive relief pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, and a preliminary injunction pursuant to the Shipping Act that would bar Respondents from enforcing the amended tariff. *See* 46 U.S.C. § 41306(a) ("After filing a complaint with the Federal Maritime Commission under section 41301 of this title, the complainant may bring a civil action in a district court of the United States to enjoin conduct in violation of this part."). On August 5, 2014, the district court entered an agreed order permitting Complainants herein to deposit the monthly access fee in excess of $8.00 per parking space per month into the court registry. *Santa Fe Discount Cruise Parking, Inc. v. The Board of Trustees of the Galveston Wharves*, C.A. No. 3:14-cv-00206 (S.D. Tex. Aug. 5, 2014) (Agreed Interim Order).

On September 22, 2014, Respondents again amended the tariff. Fees for charter bus owners and operators, commercial passenger vehicles, courtesy vehicles, shuttles, and limousines, and taxicabs were not changed from the May 22, 2014, tariff. (Proposed First Amended Verified Complaint ¶¶ IV.HH-NN; Motion to Dismiss, Affidavit of Michael Mierzwa Exh. 1 at 3F Note C.) The amended tariff rescinded the provision that determined the access fee for off-port parking users as a multiple of the number of parking spaces and imposed an access fee identical to that imposed for other users.

> Prior to October, 1, 2014, those Off-Port Parking Users, as defined herein, in operation and accessing the Texas Cruise Ship Terminal on Galveston Island®, or the Texas Cruise Ship Terminal at Pier 27, collectively the Cruise Ship Terminal Complex, shall, in lieu of the Access/Trip fee, be subject to a monthly Access Fee equal to the amount of $8.00 per parking space located in the Off-Port Parking User's

parking facility, with number of billable parking spaces to be confirmed periodically by the Galveston Wharves. In addition, Off-Port Parking Users shall pay a decal fee of $15.00 per decal per vehicle annually. This Access Fee and decal fee will be effective until October 1, 2014.

Beginning on October 1, 2014, all Off-Port Parking Users, as defined herein, shall be governed by the Provision of Note C above.

(Motion to Dismiss, Affidavit of Michael Mierzwa Exh. 1 at 3F-3G Note D.)

## II. PROCEDURAL BACKGROUND.

### A. Complaint.

The Complaint recites the factual background and alleges that Respondents violated three sections of the Shipping Act: engaging in unjust, unreasonable, and unlawful practices in violation of 46 U.S.C. § 41102(c); giving unreasonable preference or advantage, and/or imposing undue or unreasonable prejudice or disadvantage with respect to persons in violation of 46 U.S.C. § 41106(2); and, unreasonably refusing to deal or negotiate with Complainants in violation of 46 U.S.C. § 41106(3). (Complaint ¶ V.A.) Complainants also filed their Complaint in the Southern District of Texas seeking declaratory and injunctive relief pursuant to the Federal Declaratory Judgment Act and the Shipping Act. Pursuant to an order in that case, Complainants have deposited the monthly access fee in excess of $8.00 per parking space per month into the district court registry.

### B. "Amended" Complaint.

On October 21, 2014, the Secretary received a document entitled "First Amended Verified Complaint" from Complainants. The "Amended Complaint" adds paragraphs alleging that after the Complaint was filed, Respondents amended the tariff on September 22, 2014. When advised by the Secretary that "[a]mendments or supplements to any pleading (complaint, Order of Investigation and Hearing, counterclaim, crossclaim, third-party complaint, and answers thereto) will be permitted or rejected, either in the discretion of the Commission or presiding officer," 46 C.F.R. § 502.66(a), Complainants resubmitted the "First Amended Verified Complaint" with an Opposed Motion for Leave to File First Amended Verified Complaint. Respondents have filed an opposition to that motion and it is ripe for decision.

### C. Respondents' Motion to Dismiss and Respondents' Motion to Strike Response to Motion to Dismiss.

Also on October 21, 2014, Respondents filed a motion to dismiss the Complaint. On November 10, 2014, Complainants filed a response to the motion. On November 13, 2014, Respondents filed an opposed motion to strike Complainants' response to the motion to dismiss arguing that the opposition was filed late. Complainants have filed a response to the motion to

strike. On November 17, 2014, Respondents filed their reply to the opposition to the motion to dismiss. The motions are ripe for decision.

### D. Joint Motion to Temporarily Abate Discovery Schedule.

On October 31, 2014, the parties filed a joint status report. As part of the report, they jointly request that the scheduling order entered September 30, 2014, be temporarily abated pending rulings on the motion to amend and the motion to dismiss.

The motion for leave to amend, motion to dismiss, motion to strike, and joint motion to abate are addressed in this order.

## PART II – OPPOSED MOTION FOR LEAVE TO FILE FIRST AMENDED VERIFIED COMPLAINT

The first twenty-four pages of the "First Amended Verified Complaint" are substantially identical to the original Verified Complaint. Complainants add ¶ IV.HH through ¶ IV.NN setting forth facts related to the September 22, 2014, amendment to the tariff. Because these facts occurred after the original Complaint was filed, this pleading is correctly described as a supplemental complaint. *See* Fed. R. Civ. P. 15(d) ("On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented."). Misnaming the pleading does not prevent me from considering the motion. 6A Wright, Miller, & Kane, *Federal Practice and Procedure* § 1504 (2010).

Respondents oppose the motion for leave to amend. First, relying on Commission Rule 66 which states, "[w]henever by the rules in this part a pleading is required to be verified, the amendment or supplement must also be verified," 46 C.F.R. § 502.66(c), they contend that the motion to amend should be denied because the amended pleading submitted with the motion is not verified. (Respondents' Response to Motion to Amend at 1-2.) The Commission does not have a rule specifically directed at failure to sign a document. "In proceedings under this part, for situations which are not covered by a specific Commission rule, the Federal Rules of Civil Procedure will be followed to the extent that they are consistent with sound administrative practice." 46 C.F.R. § 502.12. Under the federal rules, "[t]he court must strike an unsigned paper *unless the omission is promptly corrected after being called to the attorney's or party's attention.*" Fed. R. Civ. P. 11(a) (emphasis added). Subsequent to filing the motion to amend, Complainants verified the First Amended Verified Complaint. I find this satisfies the requirement that a supplemental pleading must be verified and the failure to have an amended pleading verified prior to its submission is not grounds to deny the motion for leave to file the amended pleading.

Second, Respondents contend that "[i]n general, [Commission Rule 66] prohibits amended pleadings which would broaden the issues of the proceeding. 46 C.F.R. § 502.66(a). Contrary to their assertions, Complainants' proposed First Amended Complaint broadens the issues of this

litigation by challenging Respondents' ability to assess and collect access fees." (Respondents' Response to Motion to Amend at 2.)

Respondents do not quote the rule on which they rely in its entirety. Commission Rule 66 states: "No amendment will be allowed that would broaden the issues, *without opportunity to reply to such amended pleading and to prepare for the broadened issues*." 46 C.F.R. § 502.66(a) (emphasis added). The supplemental pleading repeats the claims of the original Complaint, adds facts that occurred after the original Complaint was filed, and makes new claims based on those fact, but does not add any new sections of the Act alleged to have been violated. The parties are still early in the discovery process. I find that to the extent that the supplemental Complaint may broaden the issues, Respondents have an opportunity to reply and prepare for the broadened issues.

Third, Respondents contend that the September 22, 2014, amendment to the tariff moots Complainants' claims. (Respondents' Response to Motion to Amend at 2-3.) As set forth more fully below, I find that Complainants' claims are not moot.

Therefore, Complainants' motion for leave to file the "First Amended Verified Complaint" is granted. On or before December 5, 2014, Respondents must file their answer to the "First Amended Verified Complaint." 46 C.F.R. § 502.66.

## PART III – MOTION TO DISMISS and MOTION TO STRIKE

### I. STATUTORY FRAMEWORK.

Complainants filed their Complaint pursuant to section 11 of the Act.

> A person may file with the Federal Maritime Commission a sworn complaint alleging a violation of this part, except section 41307(b)(1). If the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation.

46 U.S.C. § 41301(a). The Complaint alleges that Respondents are marine terminal operators within the meaning of the Act.

> The term "marine terminal operator" means a person engaged in the United States in the business of providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier subject to subchapter II of chapter 135 of title 49.

46 U.S.C. § 40102(14).

> The term "common carrier" – (A) means a person that – (i) holds itself out to the general public to provide transportation by water of passengers or cargo between the

United States and a foreign country for compensation; (ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

46 U.S.C. § 40102(6).

Complainants allege that Respondents have violated three sections of the Act:

1. "A . . . marine terminal operator . . . may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c).

2&3 "A marine terminal operator may not . . . (2) give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person; or (3) unreasonably refuse to deal or negotiate." 46 U.S.C. § 41106.

The Complaint alleges that Complainants have been injured by Respondents' alleged violations of the Act and seeks a reparation award for its actual injuries. The Act defines actual injury.

> (a) *Definition.* – In this section, the term "actual injury" includes the loss of interest at commercial rates compounded from the date of injury.
>
> (b) *Basic amount.* – If the complaint was filed within the period specified in section 41301(a) of this title, the . . . Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part, plus reasonable attorney fees.

46 U.S.C. § 41305.

## II. COMMISSION RULES OF PRACTICE AND PROCEDURE PERMIT CONSIDERATION OF A MOTION TO DISMISS OR A MOTION FOR JUDGMENT ON THE PLEADINGS.

Complainants filed their Complaint on June 16, 2014, and Respondents filed their answer on July 21, 2014. An answer is a pleading. Fed. R. Civ. P. 7(a)(2). Rule 12(b)(6) of the federal rules provides that the defense of failure to state a claim may be raised by motion, but further provides: "A motion asserting [a 12(b)(6) defense] must be made before pleading . . . ." Fed. R. Civ. P. 12(b). "Technically therefore, a post-answer 12(b)(6) motion is untimely . . . ." 5B Wright & Miller, *Federal Practice and Procedure* § 1357 (2010). Respondents filed their motion to dismiss on October 21, 2014, three months after filing their answer. Therefore, the motion is technically untimely.

Rule 12 further provides that "[f]ailure to state a claim upon which relief can be granted . . . may be raised . . . (B) by a motion under Rule 12(c)." Fed. R. Civ. P. 12(h)(2). When considering a motion for judgment on the pleadings for failure to state a claim on which relief can be granted, a court applies the same standard as it does when considering a motion under Rule 12(b)(6): "[F]or purposes of the court's considerations . . ., all of the well pleaded factual allegations in the adversary's pleadings are assumed to be true and all contravening assertions in the movant's pleading are taken to be false." 5B Wright & Miller, *Federal Practice and Procedure* § 1368 (2010). I find that the fact that Respondents filed the motion to dismiss after filing their answer does not bar consideration of its arguments.

Commission administrative law judges "make and serve initial or recommended decisions," 46 C.F.R. § 502.223, not judgments. *See also* 46 C.F.R. § 502.69(g) (defining motion for summary decision (not judgment) as a dispositive motion). A party may seek Commission review of a "dismissal of the proceeding in whole *or in part*." 46 C.F.R. § 502.227(b)(1) (emphasis added). In this administrative forum, I find that it is appropriate to treat Respondents' motion as a motion to dismiss and use this terminology rather than "judgment" as is used in Rule 12(c).

The Commission's Rules of Practice and Procedure, 46 C.F.R. Part 502, do not explicitly provide for a motion to dismiss. As stated by the Commission:

> Rule 12 of the Commission's Rules of Practice and Procedure (the Rules) states that the Federal Rules of Civil Procedure will be followed in instances that are not covered by the Commission's Rules, to the extent that application of the Federal Rules is consistent with sound administrative practice. 46 C.F.R. § 502.12. As the Commission's Rules do not address motions to dismiss for lack of subject matter jurisdiction or failure to state a claim, Federal Rules 12(b)(1) and 12(b)(6) apply in this case. *See, e.g., The Lake Charles Harbor and Terminal District v. West Cameron Port, Harbor and Terminal District*, 2007 WL 2468431 (F.M.C.).
>
> > Rule 12(b)(1) permits a party to raise by motion lack of subject matter jurisdiction, and Rule 12(b)(6) permits a party to raise by motion failure to state a claim. With regard to motions to dismiss a complaint for lack of subject matter jurisdiction under Rule 12(b)(1), such motions may assert either a factual attack or a facial attack to jurisdiction. . . . A factual attack challenges "the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered." . . . In a facial attack, on the other hand, the court examines whether the complaint has sufficiently alleged subject matter jurisdiction. As it does when considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court construes the complaint in the light most favorable to the plaintiff and accepts all well-pled facts alleged . . . in the complaint as true.

*Sinaltrainal v. Coca-Cola Company*, 578 F.3d 1252, 1260 (11th Cir. 2009).

> To survive motions to dismiss for failure to state a claim under Rule 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim "has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, [556 U.S. 662, 677] (2009). The complaint must be sufficient to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic*, 550 U.S. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)); *see also* 5 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure Civ. § 1215 (3d ed. 2010) ("[T]he test of a complaint's sufficiency simply is whether the document's allegations are detailed and informative enough to enable the defendant to respond.").

*Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, 32 S.R.R. 126, 136 (FMC 2011).

> [A] plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do, *see Papasan v. Allain*, 478 U.S. 265, 286 . . . (1986) (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation").

*Bell Atlantic Corp. v. Twombly*, 550 U.S. at 555.

> The 12(b)(6) dismissal device – as well as the corollary Rule 8(a)(2) requirement that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief" – is premised upon the principle that the plaintiff must provide the court and defendants with "fair notice of what the claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555 (citing Rule 8(a)). To that end, "allegations in a complaint must be complete enough to enable a reader to understand how each defendant was personally involved in the wrongdoing plaintiff is alleging." *Sikhs for Justice v. Nath*, 893 F. Supp. 2d 598, 616 (S.D.N.Y. 2012). Consequently, the plaintiff cannot rely upon "a generalized term like 'defendants' to obfuscate each defendant's role in the alleged conduct or the legal theory of liability on which [it] is relying." *Watkins v. Smith*, No. 12 Civ. 4635 (DLC), 2013 U.S. Dist. LEXIS 24712, 2013 WL 655085, at *9 (S.D.N.Y. Feb. 22, 2013).

*Danaher Corp. v. Travelers Indem. Co.*, No. 10 Civ. 121 (JPO), 2014 U.S. Dist. LEXIS 39300, at *10-11 (S.D.N.Y. Mar. 21, 2014).

Complainants attached ten exhibits to their Complaint. Federal Rule 12(d) provides:

> If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

Fed. R. Civ. P. 12(d).

> [O]n a motion to dismiss, a court may consider "documents attached to the complaint as an exhibit or incorporated in it by reference, . . . matters of which judicial notice may be taken, or . . . documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit." Because this standard has been misinterpreted on occasion, we reiterate here that a plaintiff's *reliance* on the terms and effect of a document in drafting the complaint is a necessary prerequisite to the court's consideration of the document on a dismissal motion; mere notice or possession is not enough. *See* [*Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47-48 (2d Cir. 1991)].

*Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002) (emphasis and ellipses in original) (footnote omitted). Complainants cited to each of their exhibits and relied on them when they drafted the Complaint. Therefore, I conclude that the exhibits are integral to the Complaint and may be considered in connection with the motion to dismiss without treating it as a motion for summary judgment as provided by Federal Rule 12(d).

Complainants also relied on the September 22, 2014, tariff when they drafted their "First Amended Verified Complaint," but did not attach a copy of the tariff. Respondents attached the September 22, 2014, tariff to their motion to dismiss. Rule 12(d) does not require conversion of this motion to dismiss to a motion for summary decision in order to consider the September 22, 2014, tariff.

> Under the "incorporation by reference" doctrine in this Circuit, "a court may look beyond the pleadings without converting the Rule 12(b)(6) motion into one for summary judgment." *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002). Specifically, courts may take into account "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff's] pleading." [*Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005)] (alteration in original) (internal citation and quotation marks omitted). A court "may treat such a document as part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6)." [*United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003)].

*Davis v. HSBC Bank*, 691 F.3d 1152, 1160 (9th Cir. 2012). *See also Broder v. Cablevision Sys. Corp.*, 418 F.3d 187, 196 (2d Cir. 2005) ("We are not limited solely to the allegations in the

complaint, however. Where a plaintiff has 'relied on the terms and effect of a document in drafting the complaint,' and that document is thus 'integral to the complaint,' we may consider its contents even if it is not formally incorporated by reference. Insofar as the complaint relies on the terms of Cablevision's customer agreement, therefore, we need not accept its description of those terms, but may look to the agreement itself.") (citation omitted); *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991) ("[W]hen a plaintiff chooses not to attach to the complaint or incorporate by reference a [document] upon which it solely relies and which is integral to the complaint, the defendant may produce the [document] when attacking the complaint for its failure to state a claim, because plaintiff should not so easily be allowed to escape the consequences of its own failure."), *cert. denied*, 503 U.S. 960 (1992).

Therefore, I may rely on the copy of the September 22, 2014, tariff attached to Respondents' motion to dismiss in ruling on this motion without converting it to a motion for summary decision.

The Commission has jurisdiction over complaints that allege violations of the Shipping Act.

> [T]he . . . appropriate test is whether a complainant's allegations are inherently a breach of contract claim, or whether they also involve elements peculiar to the Shipping Act. We find that as a general matter, allegations essentially comprising contract law claims should be dismissed unless the party alleging the violation successfully rebuts the presumption that the claim is no more than a simple contract breach claim. In contrast, where the alleged violation raises issues beyond contractual obligations, the Commission will likely presume, unless the facts as proven do not support such a claim, that the matter is appropriately before the agency.

*Cargo One, Inc. v. COSCO Container Lines Co., Ltd.*, 28 S.R.R. 1635, 1645 (FMC 2000) (footnote omitted).

## III. RESPONDENTS' MOTION TO STRIKE COMPLAINANTS' RESPONSE TO THE MOTION TO DISMISS IS DENIED.

Based on their contention that Complainants' response to the motion was filed on November 10, 2014, when it should have been filed on November 5, 2014, Respondents move to strike the response. A motion to dismiss is a dispositive motion. 46 C.F.R. § 502.69(g). Commission rules require that "[a] response to a dispositive motion must be served and filed within 15 days after the date of service of the motion." 46 C.F.R. § 502.70(b).

According to the certificate of service attached to their motion to dismiss filed with the Commission, Respondents "certify that on the 21st day of October, 2014, a copy of the [motion to dismiss] was served by certified United States mail, return receipt requested on Complainants' counsel of record." (Motion to Dismiss at Certificate of Service.) Respondents do not rely on the certificate of service filed with the Commission as grounds for their motion to strike Complainants'

response, however. Instead they rely on an email dated October 21, 2014, from Respondents' counsel's legal assistant to counsel for Complainants that states that the motion to dismiss is attached to the email. Respondents contend that pursuant to Commission rules, Complainants' response to the motion to dismiss was due no later than November 5, 2014, but Complainants did not serve their response until "November 10, 2014, nearly one week after the applicable deadline. Complainants have not filed any motions requesting additional time for response . . ., nor have they demonstrated any reasonable grounds for their failure to timely file their Response." (Respondents' Opposed Motion to Strike Complainants' Response to Motion to Dismiss at 2.) Respondents move to strike Complainants' opposition to their motion, but do not articulate any remedy beyond that.

Complainants concede that the motion to dismiss was served on October 21, 2014, by certified mail and that Respondents also sent a courtesy copy by email on that date. Complainants contend that under Federal Rule 6(d), whether service is considered by certified mail or by email, "3 days are added after the period would otherwise expire." Fed. R. Civ. P. 6(d). The fifteen-day period from October 21, 2014, ends on November 5, 2014, but when three days are added, the end date is November 8, 2014, a Saturday.

> Pursuant to 46 C.F.R. 502.101, when the last day of the period falls on a Saturday, Sunday, or national legal holiday, the period "runs until the end of the next day which is not a Saturday, Sunday, or national legal holiday." Thus, Complainants' Response to Respondents' Motion was due on Monday, November 10, 2014. . . .

(Response to Opposed Motion to Strike at 5-6.) In the alternative, Complainants argue that Respondents have not demonstrated any prejudice resulting from the late filing. (*Id.* at 6.)

Respondents are correct that Complainants' response to the motion to dismiss was due November 5, 2014. Complainants' reliance on the federal rules adding three days for mailing is misplaced: The Commission rule controlling computation of time does not have this provision. 46 C.F.R. § 502.101. Commission Rule 1 requires that its rules "be construed to secure the *just*, speedy, and inexpensive determination of every proceeding," 46 C.F.R. § 502.1 (emphasis added), and "any of the rules in this part, except §§ 502.11 and 502.153, may be waived by . . . the presiding officer in any particular case to prevent undue hardship, manifest injustice, or if the expeditious conduct of business so requires." 46 C.F.R. § 502.10. "The Commission traditionally has sought to 'do equity' rather than permit a party to be cut off from an opportunity to be heard due to a rigid or mechanical application of the Commission's rules." *Verucci Motorcycles, LLC v. Senator International Ocean, LLC*, FMC No. 06-05, Order at 4 (FMC May 7, 2008) (Order Reopening the Proceeding). In this situation, where Complainants have mistakenly complied with the federal rule instead of the Commission rule and where Respondents have not identified any prejudice resulting from the late filing, I find it appropriate to permit the late filing of Complainants' response to the motion to dismiss. Therefore, Respondents' motion to strike the response is denied.

## IV. RESPONDENTS ARE MARINE TERMINAL OPERATORS WITHIN THE MEANING OF THE ACT.

The Complaint alleges that Respondents provide wharfage, dock, warehouse, or other terminal facilities to cruise lines such as Royal Caribbean and Celebrity. (Complaint ¶ II.C.) These well-pleaded facts are taken as true for purposes of the motion to dismiss. Cruise lines are common carriers within the meaning of the Act. *Lisa Anne Cornell and G. Ware Cornell, Jr. v. Princess Cruise Lines, Ltd. (Corp), Carnival plc, and Carnival Corporation*, FMC No. 13-02, Order at 11 (FMC Aug. 28, 2014) (Order Reversing Initial Summary Decision in Part, Affirming in Part, and Vacating in Part), *Pet. For Rev. Filed*, No. 14-1208 (D.C. Cir. Oct. 21, 2014). Therefore, the Complaint alleges sufficient facts to establish that Respondents are marine terminal operators within the meaning of the Act.

## V. THE COMPLAINT DOES NOT STATE A CLAIM OF VIOLATION OF 46 U.S.C. § 41102(c).

Complainants contend that Respondents have engaged in unjust, unreasonable, and unlawful practices in violation of 46 U.S.C. § 41102(c). (Complaint ¶ V.A.) Section 41102(c) states that a marine terminal operator "may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering *property*." 46 U.S.C. § 41102(c) (emphasis added).

Respondents did not move to dismiss the Complaint for failure to state a claim of violation of section 41102(c). Complainants do not put forth an argument about section 41102 in their response. Commission Rule 70 provides: "A reply [to a response to a dispositive motion] may not raise new grounds for relief or present matters that do not relate to the response . . . ." 46 C.F.R. § 502.70(d). Despite this rule, in their reply, Respondents contend that section 41102(c) applies only to property. "This case does not involve receiving, handling or delivering property. Thus Complainants seek much broader relief which Congress has never authorized." (Reply to Response to Motion to Dismiss at 4 n.5.) Raising this argument for the first time in reply violates Rule 70(d).

Nevertheless, "a district court *sua sponte* may dismiss a complaint under Rule 12(b)(6) as long as the dismissal does not precede service of process." *Smith v. Boyd*, 945 F.2d 1041, 1043 (8th Cir. 1991). *See also* 5B C. Wright & A. Miller, *Federal Practice and Procedure* § 1357 (3d ed. 2004) ("Even if a party does not make a formal motion under Rule 12(b)(6), the district judge on his or her own initiative may note the inadequacy of the complaint and dismiss it for failure to state a claim as long as the procedure employed is fair to the parties."). Despite Respondents' improper argument, it is appropriate to rule on the propriety of a section 44102(c) claim at this point.

Complainants are in the business of transporting passengers, not property, to and from common carriers at the Cruise Terminal. While the passengers' luggage is also transported with them, I find that this is not "receiving, handling, storing, or delivering property" within the meaning of section 41102(c). Because the Complaint does not allege that Tariff Circular No. 6 relates to or

is connected with receiving, handling, storing, or delivering property within the meaning of section 41102(c), I conclude that the Complaint fails to state a claim of violation of section 41102(c) and dismiss this claim. When a complaint is dismissed for failure to state a claim, leave to amend need not be given if amendment would be futile. *Cornelius v. Bank of Am., NA*, No. 13-14905, 2014 U.S. App. LEXIS 18396, at *9-10 (11th Cir. Sept. 25, 2014) (per curiam); *Cockrell v. Sparks*, 510 F.3d 1307, 1310 (11th Cir. 2007) (per curiam). Based on the allegations in the Complaint and the evidence in the supporting documents, I conclude that amendment to the Complaint would be futile. Therefore, the dismissal is with prejudice.

## VI. THE COMPLAINT DOES NOT STATE A CLAIM OF VIOLATION OF 46 U.S.C. § 41106(3).

The Complaint alleges that Respondents violated section 41106(3) of the Act, which states that a marine terminal operator may not "unreasonably refuse to deal or negotiate." 46 U.S.C. § 41106(3). (Complaint ¶ V.A.) Respondents' motion to dismiss cites to section 41104(10) of the Act, a parallel requirement for common carriers: "A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not . . . (10) unreasonably refuse to deal or negotiate." 46 U.S.C. § 41104(10). (*See* Motion to Dismiss at 7.) Until 2006, the Act applied this common carrier provision on marine terminal operators by reference. *See* 46 App. U.S.C. § 1709(b)(10) (2002) ("No common carrier, either alone or in conjunction with any other person, directly or indirectly, may . . . unreasonably refuse to deal or negotiate."); 46 App. U.S.C. § 1709(b)(10) (2002) ("The prohibitions in subsections (b)(10) . . . of this section apply to marine terminal operators."). "On October 14, 2006, the President signed a bill reenacting the Shipping Act as positive law. The bill's purpose was to 'reorganize[e] and restat[e] the laws currently in the appendix to title 46. It codifies existing law rather than creating new law.' H.R. Rep. 109-170, at 2 (2005)." *Shipco Transport, Inc. v. Jem Logistics, Inc.*, 32 S.R.R. 1855, 1856 n.2 (FMC 2013). As part of this reorganization and restatement, the prohibition against marine terminal operators unreasonably refusing to deal or negotiate was placed in its own section. As the Commission recognizes, this reorganization did not change the law. Therefore, Respondents' reference to the wrong section of the Act is not fatal to their motion to dismiss.

Respondents move to dismiss this claim on two grounds. First, they contend that this claim is directed toward the period preceding promulgation of the May 22, 2014, version of the tariff and that the September 22, 2014, promulgation thus moots the claim. Second, they contend that the facts show Respondents did negotiate in the period prior to the May 22, 2014, promulgation. Complainants' problem is that Respondents did not adopt Complainants' position. (Motion to Dismiss at 6-8.)

Complainants respond that:

> The Complaint expressly asserts that Respondents' refusal to negotiate "is based upon intentionally misleading information about the Cruise Terminal's financial condition and not any legitimate business rationale and therefore is unreasonable."

(Complaint at ¶ V.E.) As previously indicated, Complainants have alleged that Respondents purposefully and wrongfully allocated certain costs and expenses against the Cruise Terminal's revenue flow to show a loss that would support raising their Tariff for access fees to generate revenue to pay for another cruise terminal. (Complaint ¶¶ IV.N – Q, and W.) As previously outlined, Respondents' refused to negotiate over the increase because same was being earmarked for development of a new cruise terminal, which is unreasonable and unrelated to legitimate transportation considerations.

Faced with these allegations, which must be accepted as true in this context, Respondents argue that "the Wharves did negotiate with Complainants before the May 2014 amendment . . . was adopted." (Respondents' Motion at 6.) Respondents' "negotiation" tactics, however, amount to nothing more than "bullying" or "offers you can't refuse" – as demonstrated by their conduct in amending the Tariff's access fees three times this year already (i.e., November 2013, May 2013, and Sept. 2013). Respondents assert that the fact that Complainants' representatives came to a public meeting of the Board of Trustees to communicate their position should be construed as meaning Respondents must have negotiated in that regard. No such inference is warranted, however, particularly not in a motion to dismiss where all reasonable inferences are drawn in favor of Complainants.

(Complainants' Response to Motion to Dismiss at 6-7.)

Neither the original Complaint nor the "First Amended Verified Complaint" alleges that Complainants were barred from access to the Cruise Terminal at any time between the promulgation of the 2006 tariff and the preparation of the "First Amended Verified Complaint." At no time were Complainants "shut out" of the Cruise Terminal for any reason, much less for a reason "having no relation to legitimate transportation-related factors." *New Orleans Stevedoring Co. v. Bd. of Commissioners of the Port of New Orleans*, 29 S.R.R. 345, 351 (ALJ 2001), *aff'd*, 29 S.R.R. 1066, 1070 (FMC 2002). Complainants do not allege that they did not have access to the Cruise Terminal, only that the access was on terms not to their liking. Because Complainants always had access to the Cruise Terminal, Respondents did not refuse to deal with them. Therefore, I conclude that the Complaint fails to state a claim of violation of section 41106(3) and dismiss this claim. When a complaint is dismissed for failure to state a claim, leave to amend need not be given if amendment would be futile. *Cornelius v. Bank of Am., NA*, *supra*; *Cockrell v. Sparks*, *supra*. Based on the allegations in the original Complaint and the Supplemental Complaint and the evidence in the supporting documents, I conclude that amendment to the Complaint would be futile. Therefore, the dismissal is with prejudice.

## VII. THE COMPLAINT STATES A CLAIM OF VIOLATION OF 46 U.S.C. § 41106(2).

The Complaint alleges that since 2006, local hotels have engaged in a business substantially identical to Complainants' businesses by providing parking for persons embarking on cruises. The

hotels operate shuttles that transport their customers to the Cruise Terminal, but Respondents have not charged the hotels either a per trip fee or a per space per month fee. Complainants contend that the "*de facto* exemption of local hotels from the 2006 and [May 22, 2014] 2014 Tariffs is unreasonable, and creates a competitive disadvantage due to improper allocation of the costs of the Port of Galveston's service among recipients of those services." (Complaint ¶ IV.DD.) It appears that the hotels may be required to pay the appropriate charge pursuant to the September 22, 2014, tariff.

The Complaint alleges that there are two private off-terminal parking facilities (collectively referred to as "V.I.P.") that are competitors of Complainants. Respondents "Historically allowed V.I.P.'s passengers to walk with their luggage across Harborside Drive through the 25th Street Gate into the Cruise Terminal" (Complaint ¶ IV.EE). Complainants contend that since the underlying rational of the 2006 tariff and the May 22, 2014, tariff was "focused on the benefit [off-port parking facilities] receive from the . . . generation of cruise business in the Port of Galveston, which attracts passengers to park at their private facilities," (Complaint ¶ IV.GG), exempting these two off-port parking facilities from access charges is unreasonable and discriminatory. It does not appear that these lots will be required to pay an access fee under the September 22, 2014, tariff.

Section 41106(2) provides that a marine terminal operator may not "give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person." 46 U.S.C. § 41106(2). The Commission has stated that:

> In order to establish an allegation of an unreasonable preference or prejudice, it must be shown that (1) the two parties are similarly situated or in a competitive relationship, (2) the parties were accorded different treatment, (3) the unequal treatment is not justified by differences in transportation factors, and (4) the resulting prejudice or disadvantage is the proximate cause of injury. The complainant has the burden of proving that it was subjected to different treatment and was injured as a result and the respondent has the burden of justifying the difference in treatment based on legitimate transportation factors.

*Ceres Marine Terminal, Inc. v. Maryland Port Administration*, 27 S.R.R. 1251, 1270-1271 (FMC 1997).

The Complaint alleges that Respondents violated section 41106(2) of the Act. (Complaint ¶ V.A.) The Complaint alleges that: (1) there are at least two classes of parties similarly situated to or in a competitive relationship with Complainants – (a) the hotels that rent parking spaces for the duration of a cruise and provide shuttle service to the Cruise Terminal; and (b) the "V.I.P." lots that rent parking spaces for the duration of a cruise but do not provide shuttle service to the Cruise Terminal – that (2) were accorded different treatment from Complainants – they were not charged an access fee – and (4) the resulting prejudice or disadvantage is the proximate cause of injury to Complainants. The determination of whether the unequal treatment is justified by differences in transportation factors is a merits determination requiring consideration of facts beyond the

allegations of the Complaint and is therefore not appropriate for determination on a motion to dismiss. Therefore, the Complaint states a claim of violation of section 41106(2).

The Complaint alleges that taxicabs are accorded different treatment because they have not been and are not charged an access fee for each trip. (Complaint ¶ IV.F; Motion to Dismiss, Affidavit of Michael Mierzwa Exh. 1 at 3F Note C.) While taxicabs do not pay an access fee, the Complaint does not allege that they operate off-port parking lots; therefore, they do not appear to be similarly situated to or in a competitive relationship with Complainants. The Complaint also alleges that Claimants are harmed because their shuttles are not permitted to enter the Cruise Terminal through the back gate as Respondents permit their own shuttles to enter. (Complaint ¶ IV.D.) It is not clear how Complainants contend they are harmed by this restriction. This proceeding remains open for proof on these issues.

Respondents contend that the Complaint is moot because the September 22, 2014, tariff rescinds the per space per month access fee charged under the 2006 tariff. (Motion to Dismiss at 3-4.) Complainants respond that they "have previously paid hundreds of thousands of dollars in alleged illegal assessments on their parking spaces prior to the tariff being increased in May 2014," (Response to Motion to Dismiss at 6), and that these claims are not moot. They also contend that the September 22, 2014, tariff "continues to preferentially exempt certain commercial vehicles, such as taxicabs, from access fees and fails to resolve Complainants' previous and outstanding discriminatory practice complaints regarding enforcement issues." (*Id.* at 6-7.) Complainants contend:

> By refusing to charge such motel/hotels the flat fee per month based on their total number of parking spaces, Respondents have already forced Complainants to subsidize their share of Cruise Terminal costs for several years, providing them with an undue preference or advantage over Complainants. Outstanding issues remain concerning whether Complainants are owed reparations and attorney's fees for the aforementioned unreasonable, unduly prejudicial, and/or discriminatory allocation of the Cruise Terminal's costs upon Complainants.

(Response to Motion to Dismiss at 11.) The Complaint alleges injury and seeks a reparation award for payments under the 2006 tariff. (Complaint ¶¶ VI and VII.) Therefore, the Complaint states a claim of violation of section 41106(2).

As concluded above, Complainants have stated a claim of violations of section 41106(2) of the Act. The Act provides that if a complainant proves a violation, the Commission "shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part. . . ." 46 U.S.C. § 41305(b). This claim is not mooted by the September 22, 2014, tariff.

The motion to dismiss the section 41106(2) is denied.

## PART IV – JOINT MOTION TO TEMPORARILY ABATE DISCOVERY

The parties state that they have agreed to postpone depositions in this case for thirty days to address the revised tariff and to provide time for additional settlement discussions. They jointly request that existing deadlines be postponed thirty days from the current deadlines. I note that the current due date for the Initial Decision is June 24, 2015.

The request to abate discovery is moot. The parties have stated good cause to amend the discovery schedule. The parties' proposed revised schedule is adopted with adjustments to avoid having deadlines on Sundays and federal holidays.

## O R D E R[2]

Upon consideration of Complainants' Opposed Motion for Leave to File First Amended Verified Complaint, the opposition thereto, and the record herein, and for the reasons stated above, it is hereby

**ORDERED** that the motion for leave to file be **GRANTED**. The Secretary is asked to enter the First Amended Verified Complaint on the docket. It is

**FURTHER ORDERED** that on or before December 5, 2014, Respondents file their answer to the First Amended Verified Complaint.

Upon consideration of Respondents' Opposed Motion to Strike Complainants' Response to Motion to Dismiss, the opposition thereto, and the record herein, and for the reasons stated above, it is hereby

**ORDERED** that the motion to strike be **DENIED**.

Upon consideration of Respondents the Board of Trustees of the Galveston Wharves' and the Galveston Port Facilities Corporation's Motion to Dismiss, the opposition thereto, and the record herein, and for the reasons stated above, it is hereby

**ORDERED** that the motion to dismiss be **GRANTED** in part and **DENIED** in part. It is

**FURTHER ORDERED** that the claims of violation of section 41102(c) of the Shipping Act, 46 U.S.C. § 41102(c), be **DISMISSED** with prejudice. It is

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[2] The dismissals will become final in thirty days unless a party appeals the dismissals or the Commission reviews the dismissals on its own motion. 46 C.F.R. §§ 502.227(b) and (c).

**FURTHER ORDERED** that the claims of violation of section 41104(3) of the Shipping Act,46 U.S.C. § 41106(3), be **DISMISSED** with prejudice. It is

**FURTHER ORDERED** that in all other respects, the motions to dismiss be **DENIED**.

Upon consideration of the Joint Motion to Temporarily Abate Discovery, it is hereby

**ORDERED** that the motion be **DISMISSED** as moot. The discovery schedule is revised *sua sponte* as follows:

| | |
|---|---|
| October 15, 2014 | Parties may commence with depositions of fact witnesses. |
| December 22, 2014 | Complainants must designate affirmative expert witnesses and produce expert reports for same. |
| January 5, 2015 | Deadline for Parties to serve written discovery requests. The Parties are ordered to respond to discovery requests within 30 days of service. |
| January 19, 2015 | Respondents must designate affirmative expert witnesses and produce expert reports for same. |
| February 2, 2015 | Parties must designate rebuttal expert witnesses and produce expert reports for same. Deadline for Parties to complete discovery. Parties may depose rebuttal experts prior to February 20, 2015. |

The parties are ordered to file joint status reports on December 22, 2014, January 12, 2015, and February 2, 2015. The January 12, 2015, status report should address the following matters: (1) The parties must propose a schedule for submission of proposed findings of fact, appendices with documentary evidence supporting the proposed findings, and briefs; (2) If a party or parties believe that an oral hearing is necessary, the parties should identify with particularity the issues that cannot be resolved without a hearing and/or the nature of the matters in issue that require a hearing. If the parties believe that an oral hearing is necessary, they must propose a location for the hearing. The presiding judge will determine the necessity of an oral hearing and place of the hearing.

C Clay G. Guthridge

Clay G. Guthridge
Administrative Law Judge